FILED
MAR 3 195
CHARLES ELMORE CR
C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 596

SOUTHWEST STONE COMPANY, *Petitioner*

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *Respondent*

RESPONDENT'S REPLY BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

O. O. TOUCHSTONE
Attorney of Record for Respondent
305 Southland Life Building
Dallas 1, Texas

G. H. PENLAND,
Dallas, Texas
Of Counsel

E. DUNCAN & CO., Brief Printers, 1329 E. Jefferson, Dallas, Texas

INDEX

	Page
Statement	2
Response to Specification of Errors	3
Reply to Reasons for Granting the Writ	4
Reply to Summary of Facts Held to be Irrelevant	6
Reply to Summary of Facts Admitted in Evidence	7
Conclusion	7-8
Certificate of Service	8

INDEX OF AUTHORITIES

Bers v. Erie R. Co., 225 N.Y. 543, 122 N.E. 457	5
Great Lakes Steel Corp. v. D.T. & L.R. Co., 26 N.W. (2d) 704, 317 Mich. 126	5
McDonald et al v. Chicago & N.W. Ry. Co., (Wis. - 1936), 266 N.W. 246, p. 249; 13 C.J.S. Carriers, Sec. 165, p. 324	5
Norfolk Tidewater Terminal v. N. & P.B.L.R. Co., (Va.) 195 S.E. 680, 170 Va. 118	5
Rice & Lockwood Lumber Co. v. Boston & M.R.R., 31 N.E. (2d) 219, p. 221, 309 Mass. 101	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 596

SOUTHWEST STONE COMPANY, *Petitioner*

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *Respondent*

RESPONDENT'S REPLY BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States:

Respondent, Missouri-Kansas-Texas Railroad Company, respectfully submits that the action of the Court of Appeals, as reflected by its opinion in all things sustaining the verdict of the jury and the judgment of the trial court, is correct in that there exists no basis for the granting of a writ of certiorari. In reply to the petition for the writ, respondent respectfully shows unto the court the following:

STATEMENT

(In Reply to Petitioner's Statement, pp. 4-5 of the Petition)

The respondent respectfully challenges the statement of petitioner to the effect that none of the cars on which demurrage was claimed was placed in a position accessible for loading, because the verdict of the jury has in all things foreclosed this issue. The cause of action was a claim for demurrage upon a detention of 271 specific cars in the year 1950. The respondent as plaintiff in the trial court specifically identified each one of such cars by the number, the initial, the time ordered out by petitioner as defendant, and the date and time actually placed. Such statement further identified the track upon which each car was placed, which tracks were not public delivery tracks but were private sidings of appellant (R. 152). Such statement further itemized the days detained, the debit, credit, and charges (R. 10-18). Such statement was proved by competent legal evidence (R. 55-59).

The petitioner as defendant in the trial court admitted in its answer that it loaded and forwarded the several cars of freight specified on or about the time shown therein (R. 18). It attempted to combat the evidence as reflected by the statement of the several cars proved by respondent by offering in evidence an account of its own, in which account petitioner stated that 103 cars were ordered out at a different time and returned to respondent railroad at a different time (R. 157-160). This was the only

evidence by which the petitioner in any manner attempted to refute the specific charges upon the specific cars upon which demurrage was claimed. In this posture the trial court submitted the cause to the jury and upon such verdict of the jury judgment was rendered in favor of the respondent as plaintiff (R. 154-156). There is no evidence throughout the entire record that the actual cars involved were stored or placed on tracks designated 1, 2, 3, and 4 for the benefit of the respondent railroad, or at it utilized such private tracks for this purpose. As heretofore stated, such tracks 1, 2, 3, and 4 were to all intents and purposes the private sidings of the respondent. If there is any evidence in the record which would have sustained a jury finding to such an effect, then such question has been foreclosed by the verdict of the jury as a controverted fact issue (R. 107).

The rejected evidence was in no manner competent or relevant to this controversy, because it did not tend to prove that the cars in controversy were stored on the tracks by the respondent railroad.

RESPONSE TO SPECIFICATION OF ERRORS
(p. 5 of Petition)

Such specifications of errors in no manner present errors of substantive law which would require this court to overturn the verdict of a jury upon the controverted facts in issue, which facts were duly submitted to the jury upon appropriate instructions.

REPLY TO REASONS FOR GRANTING THE WRIT
(pp. 5-8 of the Petition)

The respondent respectfully submits that the cases cited by petitioner are in no degree apposite to the record in this cause. In this cause there is a verdict of a jury upon all controverted issues of fact. It was the contention of the petitioner that the railroad utilized these tracks for storage purposes. It attempted to prove this issue by evidence which respondent contends was nothing more than vague, glittering generalities (R. 150-151, R. 134). If respondent is incorrect and these generalities had the standing of probative evidence, then the jury has resolved the controverted facts against petitioner.

In each of the cases cited there was no jury verdict; in each of the cases cited the court held that the cars were stored prior to appropriation for use. No such facts are present in this cause and the inquiry was foreclosed by the jury verdict. The respondent was only bound to place the specific cars ordered out upon the private sidings of petitioner. For an apt statement of the rule, the court is referred to the following from the case of *Rice & Lockwood Lumber Co. v. Boston & M.R.R.*, 31 N.E. (2d) 219, p. 221, 309 Mass. 101:

> "* * * It is a matter of common knowledge that many industrial plants are equipped with side tracks for the reception and shipment of carloads of freight and that it is the general and universal practice of railroad corporations to deliver and accept cars upon

such sidings. New York Central & Hudson River Railroad v. General Electric Co., 219 N.Y. 227, 114 N.E. 115, 1 A.L.R. 1417, United States v. American Sheet & Tin Plate Co., 301 U.S. 402, 57 S. Ct. 804, 81 L. Ed. 1186. It has been held that a railroad corporation is required to deliver cars upon such a siding provided it is within its switching area or its terminal limits, and that transportation ends when cars are placed upon the siding. New York, New Haven & Hartford Railroad v. Porter, 220 Mass. 547, 108 N. E. 499; Batchelder & Snyder Co. v. Union Freight Railroad, 259 Mass. 368, 156 N.E. 698, 54 A.L.R. 616; Los Aangles Switching Case (Interstate Commerce Comm. v. Atchison, T. & S. F. R. Co.), 234 U.S. 294, 34 S. Ct. 814, 58 L. Ed. 1319; United States v. American Sheet & Tin Plate Co., 301 U.S. 402, 57 S. Ct. 804, 81 L. Ed. 1186; Banner Grain Co. v. Great Northern Railroad, 119 Minn. 68, 137 N.W. 161, 41 L.R.A., N.S., 678; New York Central & Hudson River Railroad v. General Electric Co., 219 N.Y. 227, 114 N.E. 115, 1 A.L.R. 1417; Lee v. Erie Railroad, 173 App. Div. 75, 158 N.Y.S. 730."

In addition to the authorities cited in such above case, attention is respectfully directed to the following, which hold that a railroad's duty is discharged when the car is placed upon the private siding of the shipper for loading: *McDonald et al v. Chicago & N.W. Ry. Co.*, (Wis. - 1936), 266 N.W. 246, p. 249; 13 C.J.S. Carriers, Sec. 165, p. 324; *Great Lakes Steel Corp. v. D. T. & L. R. Co.* 26 N.W. (2d) 704, 317 Mich. 126; *Norfolk Tidewater Terminal v. N. & P. B.L.R. Co.*, (Va.) 195 S. E. 680, 170 Va. 118; *Bers v. Erie R. Co.*, 225 N.Y. 543, 122 N.E. 457.

In the conclusion the respondent insists that the two cases cited on Page 6 of the petition are in no degree in conflict; that there could be no conflict because the jury has decided all controverted issues of fact, which verdict includes a finding that these specific cars were never stored on the private sidings of the petitioner for the benefit of the railroad. It likewise includes a finding that the railroad had never utilized such tracks for this purpose, contrary to the claim of petitioner.

REPLY TO SUMMARY OF FACTS HELD TO BE IRRELEVANT

(pp. 8-9 of Ptitioner)

The petitioner attempted to prove that the cars in controversy were stored on its private tracks by an attempted introduction of a letter written by agent of the railroad in 1923 and also a letter written on August 5, 1937 (R. 172-173). Both lower courts properly held that these letters could not have any relevancy to conditions existing in 1950. It further appeared as a matter of record that any understanding or any prior position assumed by the railroad had been abandoned at the time of this controversy, because the railroad was not using the tracks in controversy for storage purposes during the year 1950. Respondent respectfully insists that the letters were utterly irrelevant for the reasons stated in the opinion of the Court of Appeals.

REPLY TO SUMMARY OF FACTS ADMITTED IN EVIDENCE

(pp. 9-12 of the Petition)

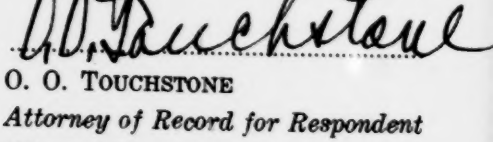
Any characterization of Tracks 1, 2, 3, and 4 as storage tracks is the appellation of the petitioner; petitioner's president called them storage tracks upon the trial (R. 113-132). Any testimony that the cars were still considered the railroad's cars after being placed on any of such tracks came from petitioner (R. 133). *There was no specific evidence with regard to the cars in controversy upon which the charges were made being stored upon any track for the benefit of the railroad.* If such appellation and such a construction by the petitioner reaches the dignity of probative evidence, then the jury has resolved such facts against petitioner. The entire summary of facts as presented by petitioner is nothing more than an attempt to secure a reweighing of the evidence; it is likewise nothing more than an attempt to prevail upon this court to set aside a jury verdict upon controverted facts contrary to the Seventh Amendment to the United States Constitution.

CONCLUSION

The respondent respectfully submits that no grounds are presented which would authorize the granting of a writ of certiorari in this cause and that the petition for a writ

should be in all things refused, and in duty bound respondent will ever pray.

Respectfully submitted,



O. O. TOUCHSTONE
Attorney of Record for Respondent
Missouri-Kansas-Texas Railroad Company
305 Southland Life Building
Dallas 1, Texas

G. H. PENLAND,
Dallas, Texas
Of Counsel

CERTIFICATE OF SERVICE

A copy of the above and foregoing reply brief has been duly served upon the attorneys for petitioner, Messrs. Ralph W. Currie and Frank A. Leffingwell, whose address is 1515 Praetorian Building, Dallas, Texas, by delivery of a printed copy to such attorneys, in their office, prior to the mailing of the originals to the Clerk of the United States Supreme Court for filing.

O. O. Touchstone